
In Re
Supreme Court of The United States

No. 88-6059

October Term, 1988

RHETT DEPEW,

PETITIONER,

-vs-

STATE OF OHIO,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

I. Whether Extensive Prosecutorial Misconduct At The Sentencing Phase Of A Capital Trial Warrants A Reversal Of The Death Sentence, A Question Unanswered By This Court's Decision In Darden v. Wainwright, 477 U.S. 168 (1986).

II. Whether The Ohio Supreme Court Misapplied The Harmless Error Standard To The Prosecutorial Misconduct In The Sentencing Phase Of Petitioner's Capital Trial In Violation Of This Court's Decision In Satterwhite V. Texas, 486 U.S. _____, 100 L.E. 2d 284 (1988).

TABLE OF CONTENTS

	<u>Page No.</u>
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1-2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
PRESERVATION OF FEDERAL QUESTION	3-4
REASONS FOR GRANTING WRIT	
I. THE REPEATED OCCURRENCES OF PROSECUTORIAL MISCONDUCT AT THE MITIGATION PHASE OF PETITIONER'S CAPITAL TRIAL RESULTED IN AN UNRELIABLE DEATH DETERMINATION.	4
II. THE INTRODUCTION OF EIGHT SEPARATE INSTANCES OF PROSECUTORIAL MISCONDUCT AT THE PENALTY PHASE OF PETITIONER'S CAPITAL TRIAL DID NOT CONSTITUTE HARMLESS ERROR.	9
CONCLUSION	
APPENDIX:	
Rehearing Entry	A-1
Propositions of Law Raised in the Ohio Supreme Court	A-2 - A-5
Opinion of the Ohio Supreme Court	A-6 - A-30
Assignments of Error Raised in the Court of Appeals	A-31 - A-34
Opinion and Journal Entry of the Court of Appeals	A-35 - A-65
Opinion of the Trial Court	A-66 - A-72
Indictment	A-73 - A-74
Amendment V, United States Constitution	A-75
Amendment VI, United States Constitution	A-76
Amendment VIII, United States Constitution	A-77
Amendment XIV, United States Constitution	A-78
Section 16, Article I, Ohio Constitution	A-79
Section 10, Article I, Ohio Constitution	A-80
Section 9, Article I, Ohio Constitution	A-81

United States Code, Section 1257	A-82
Ohio Rev. Code Ann. Section 2929.05	A-83
Ohio Rev. Code Ann. Section 2929.04	A-84
Ohio Rev. Code Ann. Section 2929.03	A-85 - A-86
Trial Court Transcript, Page 341	A-87
Trial Court Transcript, Page 566	A-88
Trial Court Transcript, Page 567	A-89
Trial Court Transcript, Page 570	A-90
Trial Court Transcript, Page 572	A-91
Trial Court Transcript, Page 575	A-92
Trial Court Transcript, Page 576	A-93
Trial Court Transcript, Page 577	A-94
Trial Court Transcript, Page 578	A-95

TABLE OF AUTHORITIES

	<u>Page No.</u>
<u>CASES:</u>	
<u>Caldwell v. Mississippi</u> , 472 U.S. 320 (1985)	8
<u>Darden v. Wainwright</u> , 477 U.S. 168 (1986)	7, 8, 9
<u>Satterwhite v. Texas</u> , 486 U.S. ___, 100 L.E. 2d 284 (1988)	9, 10, 11, 12
<u>State v. Daniel Bedford</u> , 39 Ohio St. 3d 122, 529 N.E. 2d 913 (1988)	9
<u>State v. Debra Brown</u> , 38 Ohio St. 3d 305, 528 N.E. 2d 523 (1988)	9
<u>State v. DePew</u> , 38 Ohio St. 3d 275, 528 N.E. 2d 542 (1988)	1, 4, 5, 6, 7, 8, 10
<u>State v. Rhett DePew</u> , Butler App. No. CA85-07-075 (June 29, 1987), unreported	1, 11
<u>State v. Paul Greer</u> , 39 Ohio St. 3d 236 (1988)	9
<u>State v. Donald Williams</u> , 38 Ohio St. 3d 346, 528 N.E. 2d 510 (1988)	9
<u>Woodson v. North Carolina</u> , 428 U.S. 280 (1976)	12
<u>CONSTITUTIONAL PROVISIONS:</u>	
Fifth Amendment, United States Constitution	2, 4
Sixth Amendment, United States Constitution	2, 4
Eighth Amendment, United States Constitution	2, 4
Fourteenth Amendment, United States Constitution	2, 4
Section (2)(B)(2)(a)(ii), Article IV, Ohio Constitution	1
<u>STATUTES:</u>	
28 U.S.C. Section 1257(3)	2
Ohio Rev. Code Ann. Section 2929.03(D)(1) (Page, 1988)	5
Ohio Rev. Code Ann. Section 2929.04(A)(5) (Page, 1988)	3
Ohio Rev. Code Ann. Section 2929.04(A)(7) (Page, 1988)	3

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STATE OF OHIO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioner, Rhett DePew, prays that a writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in the above-entitled proceeding on August 31, 1988.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported as State v. DePew, 38 Ohio St. 3d 275 (1988) (Appendix A-6 - A-30). The opinion of the Court of Appeals, Twelfth Judicial District, is unreported and reprinted in the appendix. (Appendix A-35 - A-65.) The trial court opinion also appears in the appendix. (A-66 - A-72.)

JURISDICTIONAL STATEMENT

The Petitioner's convictions and death sentences were affirmed by the Ohio Court of Appeals, Twelfth Judicial District. Petitioner appealed as a matter of right to the Ohio Supreme Court. (Ohio Constitution, Section (2)(B)(2)(a)(ii), Article IV). The Ohio Supreme Court affirmed the decision of the Court of Appeals on August 31, 1988. On September 8, 1988, Petitioner

filed a Motion For Rehearing. The Motion For Rehearing was denied by the Ohio Supreme Court on October 5, 1988.

The jurisdiction of this Court to review the judgment of the Ohio Supreme Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY
PROVISIONS

This case involves the following Amendments to the United States Constitution:

A) The Fifth Amendment, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B) The Sixth Amendment, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

C) The Eighth Amendment which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D) The Fourteenth Amendment, which provides in pertinent part:

No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, within the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Ohio statutes or rules that are implicated are reprinted in the appendix.

STATEMENT OF THE CASE

Petitioner DePew was indicted by the Butler County Grand Jury for the aggravated murders of Theresa Jones, Aubrey Jones and Elizabeth Burton. Each count of aggravated murder contained three death penalty specifications: the offense was committed while the offender was committing aggravated burglary, Ohio Rev. Code Ann. Section 2929.04(A)(7) (Page, 1988); the offense was committed while the offender was committing aggravated arson, Ohio Rev. Code Ann. Section 2929.04(A)(7) (Page, 1988), and the offense was part of a course of conduct involving the purposeful killing of two or more persons, Ohio Rev. Code Ann. Section 2929.04(A)(5) (Page, 1988).

Petitioner's jury trial began on June 17, 1985. At the conclusion of the guilt phase, the jury returned a verdict of guilty to the three counts of aggravated murder and the accompanying capital specifications.

The mitigation phase of Petitioner DePew's trial commenced on June 19, 1985. Petitioner presented twenty witnesses on his behalf at mitigation and his own unsworn statement. The state presented no witnesses in rebuttal at mitigation but engaged in a substantial amount of misconduct. The jury sentenced Petitioner DePew to death.

Petitioner appealed this decision to the Twelfth District Court of Appeals and the Ohio Supreme Court. Both courts affirmed the convictions and his death sentence.

PRESERVATION OF THE FEDERAL QUESTION

The error raised by the First Question Presented was raised to the Ohio Supreme Court as Proposition of Law Number Eleven. The Court addressed the merits of each instance of the prosecutorial misconduct in its opinion. The Ohio Supreme Court was also requested to reconsider its decision on the prosecutorial misconduct in a Motion For Rehearing.

The error raised by the Second Question Presented was raised to the Ohio Supreme Court as Proposition of Law Number Fourteen and in a Motion For Rehearing filed after the court's decision. In both documents, the issue was framed in terms of the reliability of the death determination where a capital trial is infected with a substantial number of errors.

The Fifth, Sixth, Eighth and Fourteenth Amendments were relied on for support as well as various provisions of the Ohio Constitution.

REASONS FOR GRANTING THE WRIT

I.

THE REPEATED OCCURRENCES OF PROSECUTORIAL MISCONDUCT AT THE MITIGATION PHASE OF PETITIONER'S CAPITAL TRIAL RESULTED IN AN UNRELIABLE DEATH DETERMINATION.

Throughout the mitigation phase of Petitioner DePew's capital trial, the State of Ohio engaged in numerous instances of prosecutorial misconduct. In its opinion in Petitioner's case, the Ohio Supreme Court recognized that the following actions by the State of Ohio constituted misconduct.

I. The first example arose when the State of Ohio conveyed to the jury that Petitioner DePew had been involved in a knife fight when in fact no fight took place. It occurred during the cross-examination of a defense witness who had characterized Petitioner DePew as a quiet, easy and outgoing person.

Q. Did you ever see ... [Petitioner] carry a large knife in his jacket or anything?

A. No.

Q. You knew he got cut in a knife fight over at King Kwik, didn't you?

A. Yes, I did.

Trial transcript, hereafter Tr. at 341. (A-87.)

A subsequent bench conference revealed that no "fight" had taken place; instead, Mr. DePew was the victim of the fight. Tr. 344-46.

Of this instance of prosecutorial misconduct the Ohio Supreme Court found that "the question by the prosecutor regarding the knife fight was improper." State v. DePew, 38 Ohio St. 3d 275, 284, 528 N.E. 2d 342 (1988).

II. Petitioner DePew's capital trial concerned three aggravated murders that occurred on November 23, 1984. Subsequent to November 23rd, Petitioner was arrested and convicted for the unrelated crime of receiving stolen property. At its mitigation closing in the capital trial, the State of Ohio argued the following.

He wouldn't sit in that chair because then he would have to answer my questions. And then I would ask him if he has ever been convicted of a criminal offense after the date in question.

Tr. 578. (A-95.)

The Ohio Supreme Court recognized the impropriety of this argument. "The remark by the prosecutor was not proper impeachment of the credibility of appellant, who had made no statement relating to his criminal history subsequent to this offense (although in his unsworn statement appellant declared that he had no criminal record prior to this offense)." DePew, 38 Ohio St. 3d at 284.

III. Pursuant to Ohio Rev. Code Ann. Section 2929.03(D)(1) (Page, 1988), Petitioner exercised his right to make an unsworn statement at mitigation. The prosecutor, on two separate occasions, commented on Petitioner's failure to make a statement under oath. One of the two instances involved the quote set out above in Section II. The second comment occurred as follows:

The other thing I thought in this case, you know, nothing in this case can be fun, and I don't mean for it to be that way. But the gentleman for the defendant, he told you five different times about the oath you took, and about the oath we all take, and the oath I take, and the oath you take - everybody takes the oath except the defendant; he isn't man enough to get up here and take the oath. Everybody in this case raised his right hand to this man, and he says I solemnly swear to tell the truth so help me God. Everybody except DePew.

Tr. 577-78. (Emphasis added.) (A-94 - A-95.)

In addressing this issue, the Ohio Supreme Court stated that "[t]o permit the prosecutor to extensively comment on the fact that the defendant's statement is unsworn affects Fifth Amendment rights and negates the defendant's statutory prerogative." DePew, 38 Ohio St. 3d at 285. The Ohio Supreme Court then continued on to define the parameters of prosecutorial comment on a defendant's unsworn statement. At the conclusion of its analysis, the Court stated that "the remarks made herein surely exceed the proper scope of comment set forth today...." Id.

IV. During the penalty phase, the State of Ohio introduced a photograph of Petitioner standing next to a marijuana plant. The prosecutor referred to this photograph in his closing argument.

[S]o we thought we would show you a few things we thought were relevant - we thought were relevant, you know, to the last five years. There it says self and little brother, first year, (unclear) homegrown ten feet tall. Growing a little grass there you see.

Tr. 567. (A-89.)

The Ohio Supreme Court stated as follows:

"Admission of the marijuana photographs was error, since its probative value was nonexistent and its potential for prejudice was significant."

DePew, 38 Ohio St. 3d at 287.

V. The State of Ohio, in its closing argument speculated about the possible sentences Petitioner could receive and his chances for parole.

The defense says, and I knew they would, it doesn't make any difference what kind of penalty that you put on him because any sentence you give him is the death sentence. But that's not true. That's not true. Why, my goodness, Sirhan Sirhan is talking about getting out for killing Bobby Kennedy.

Tr. 572. (A-91.)

The prosecutor then continued:

Well, if Your Honor please, he led them to believe that life means life, and it doesn't necessarily mean that, as the Court knows.

* * *

Now, you're going to have a lot of ... three options in this case, and you know what the three of them are. But what I'm telling you, when you hear, as the defendant told you, that twenty to life ... or life with eligibility in twenty means you're going to be there for life - that's not necessarily true.

It's not necessarily true that if you get three counts of twenty to life that it will add up to sixty - that's not necessarily true. And that's the way the law is.

Tr. 572. (A-91.)

The Ohio Supreme Court inherently recognized these comments as "inappropriate or even universally condemned." DePew, 38 Ohio St. 3d at 287.

VI. During the mitigation phase closing argument, the prosecutor alluded to certain facts that were not in evidence. The prosecutor informed the jury that Petitioner's confession was not freely given, but given only after his girlfriend had turned him in to the police four months later. Tr. 566. (A-88.) No evidence existed in the trial record to support this statement.

Again, the Ohio Supreme Court implicitly recognized that this comment was "inappropriate or even universally condemned." Id.

VII. The prosecutor inquired of the jurors, at the penalty phase, why Petitioner did not present certain witnesses in his behalf at mitigation, most specifically, his common law wife. Tr. 576. (A-93.) The prosecutor also told the jurors that anyone, even Adolph Hitler, could bring someone in to testify as to his good character. Tr. 575. (A-92.)

These comments were inherently found by the Ohio Supreme Court to be "inappropriate or even universally condemned." Id.

VIII. Finally, the prosecutor made several remarks which appealed to "law and order". Tr. 570. (A-90.) Again, these comments were classified by the Ohio Supreme Court as "inappropriate or even universally condemned." Id.

In addressing all eight claims of misconduct the Ohio Supreme Court stated that "all these comments, taken together or even standing alone, constitute unreasonable and unfair conduct by the prosecutor...." Id. at 288. Although the Ohio Supreme Court reached this conclusion in each instance, it did not reverse Petitioner's death sentence; instead the Court relied either on the harmless error doctrine or this Court's decision in Darden v. Wainwright, 477 U.S. 168 (1986), to support affirmance of Petitioner's death sentence. The harmless error analysis will be discussed in detail in the Second Reason for Granting the Writ, infra.

In relying on Darden v. Wainwright, the Ohio Supreme Court explained that the "remarks by the prosecutor in Darden were clearly more inflammatory than those complained of herein." State v. DePew, 38 Ohio St. 3d at 288. The Ohio Supreme Court then went on to conclude that the "comments in the instant cause did not contaminate the proceedings to the point that Appellant's right to a fair trial was destroyed. ... The remarks in question did not render the penalty stage of Appellant's trial fundamentally unfair." Id.

The reliance on Darden v. Wainwright is totally misplaced. The prosecutorial misconduct in Darden arose in the guilt phase of the trial, not in the penalty phase. As this Court set forth in Darden, "[i]n this case, the

comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing." Darden v. Wainwright, 477 U.S. at 183, n.15.

By contrast, all the prosecutorial misconduct raised in Petitioner's case occurred at the sentencing phase. Its injection into the death determination process "rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case'". Caldwell v. Mississippi, 472 U.S. 320, 323 (1985) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). The comments made by the prosecutor in Petitioner's case allowed the jury to rest its death determination on impermissible and irrelevant factors. As a result, the Petitioner's death sentence should have been vacated; however, the Ohio Supreme Court refused to do so and affirmed the Petitioner's death sentence. Rather than reversing Petitioner's death sentence, the Ohio Supreme Court decided to fashion a new "remedy" for capital cases where prosecutorial misconduct has occurred. "In order to preserve the fairness of trial proceedings and to deter further misconduct, it is henceforth the intention of this Court to refer matters of misconduct to the Disciplinary Counsel in those cases where we find it necessary and proper to do so." State v. DePew, 38 Ohio St. 3d at 289.

This "remedy" is totally inappropriate for errors that have occurred due to prosecutorial misconduct. As this Court has recognized, prosecutorial misconduct involves a constitutional error. Darden v. Wainwright, 477 U.S. at 183, n.15. A constitutional error cannot be remedied by referring the case to a State's Disciplinary Counsel. As Justice Wright explained in his dissent in State v. DePew, 38 Ohio St. 3d at 299:

I am troubled by the seeming departure from past case law that would compel reversal of the penalty phase of these proceedings and the suggestion that we should handle blatant prosecutorial misconduct through the Office of Disciplinary Counsel. I submit that this is cold comfort to the appellant who faces death by electrocution.

The only appropriate remedy is to reverse the conviction or death sentence.

Moreover, although the Ohio Supreme Court created this "remedy" to be applied prospectively, it has not referred one case to the Disciplinary Counsel.¹ More importantly, however, it failed to refer the prosecutor in Petitioner's case to the counsel.

The prosecutorial misconduct that occurred in Petitioner DePew's case was egregious and inappropriate. Each instance raised in this Petition was recognized by the Ohio Supreme Court as constituting misconduct yet the Ohio Supreme Court improperly relied on Darden v. Wainwright to affirm Petitioner's death sentence. This Court should grant certiorari to resolve the question not raised in Darden v. Wainwright of whether extensive prosecutorial misconduct at the sentencing phase of a capital trial warrants a reversal of Petitioner's death sentence.

II.

THE INTRODUCTION OF EIGHT SEPARATE INSTANCES OF PROSECUTORIAL MISCONDUCT AT THE PENALTY PHASE OF PETITIONER'S CAPITAL TRIAL DID NOT CONSTITUTE HARMLESS ERROR.

The penalty phase of Petitioner's capital trial was infected with eight separate instances of prosecutorial misconduct. The Ohio Supreme Court recognized the error of introducing this inflammatory material into Petitioner's trial; however, the court refused to reverse Petitioner's death sentence and instead relied on the harmless error doctrine. The application of harmless error in Petitioner's case was unwarranted and the standard applied by the Ohio Supreme Court did not comply with this Court's decision in Satterwhite v. Texas, 486 U.S. ___, 100 L.E. 2d 284 (1988).

In Satterwhite v. Texas, this Court set forth the harmless error standard to be applied in a capital case. This Court concluded "that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand." Id. at ___, 100 L.E. 2d at 293. Moreover, the "question, however,

¹ Since State v. DePew was announced by the Ohio Supreme Court, that court has considered four cases involving an issue concerning prosecutorial misconduct in which the Court did not reverse or refer the case to the Disciplinary Counsel: State v. Debra Brown, 38 Ohio St. 3d 303, 528 N.E. 2d 523 (1988); State v. Donald Williams, 38 Ohio St. 3d 346, 528 N.E. 2d 910 (1988); State v. Daniel Bedford, 39 Ohio St. 3d 122, 529 N.E. 2d 913 (1988), and; State v. Paul Greer, 39 Ohio St. 3d 236 (1988).

is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. at ___, 100 L.E. 2d at 295. (Quoting Chapman v. California, 386 U.S. 18, 24 (1967)). (Emphasis added.)

The Ohio Supreme Court failed to follow this test when it applied the harmless error doctrine in Petitioner's case to the occurrences of prosecutorial misconduct. The Ohio Supreme Court first stated that the "remarks by the prosecutor in Darden [v. Wainwright], 477 U.S. 168 (1986)) were clearly more inflammatory than those complained of herein. The comments in the instant cause did not contaminate the proceedings to the point that appellant's right to a fair trial was destroyed. The evidence supporting the sentence of death in this case was indeed overwhelming." State v. DePew, 38 Ohio St. 3d at 288. (Emphasis added.) At a later point in the Ohio Supreme Court's decision, the Court explained:

While all these comments, taken together or even standing alone, constitute unreasonable and unfair conduct by the prosecutor, we must balance against that conduct the admission of appellant that he brutally stabbed to death a young mother, her daughter and her younger sister and then mutilated their bodies by fire. In cases such as this, we cannot ignore the compelling interest of the public, which has every right to expect its criminal justice system to work effectively.

Id.

Both quotes from the Ohio Supreme Court opinion underscore the fact that the Court did not engage in the analysis set forth in Satterwhite v. Texas. Instead the Court focused on the fact that overwhelming evidence supported Petitioner's death sentence, a fact this Court found irrelevant in Satterwhite, Petitioner's confession and the public interest in an effective justice system. At no point in its opinion did the Court hold that the State had proved beyond a reasonable doubt that the error complained of did not contribute to the verdict at the sentencing phase of Petitioner's trial.

The Ohio Supreme Court's entire analysis regarding the harmless error doctrine was flawed. Its concentration on the overwhelming evidence

supporting Petitioner's death sentence was irrelevant to a determination that the prosecutorial misconduct constituted harmless error. Even had the Ohio Supreme Court applied the correct standard from Satterwhite, however, the misconduct by the State did not constitute harmless error.

The prosecutorial misconduct in Petitioner's case involved introducing inflammatory and irrelevant evidence to the jury. Some of the evidence introduced was not even part of the record. The prosecutorial misconduct also implicated Petitioner's Fifth Amendment rights. Due to the substantial nature of the misconduct, it cannot be stated, beyond a reasonable doubt, that it did not contribute to the death verdict in Petitioner's case.

Moreover, although Petitioner was convicted of nine capital specifications, a wealth of mitigation was introduced at his behalf at the penalty phase. Petitioner presented twenty witnesses on his behalf at mitigation and his own unsworn statement. The Court of Appeals, in its opinion, recognized that the trial court considered the following mitigation:

- (1) The appellant was no problem to society prior to the offense and that he had not been convicted or arrested previously.
- (2) Appellant did favors for others and that he was helpful.
- (3) Appellant was unusually sensitive.
- (4) Appellant was good with children.
- (5) Appellant was a "good boy" as a child and had a normal childhood.
- (6) Appellant was a good husband.
- (7) Appellant was relatively youthful.
- (8) While he intended to burglarize the home he did not intend to kill anyone.

State v. Rhett DePew, Butler App. No. CA85-07-075 (June 29, 1987), p. 27 (A-63.) Based on this record, the misconduct committed by the State of Ohio did not constitute harmless error. Application of Satterwhite v. Texas, 486 U.S. ___, 100 L.E. 2d 284 (1988), emphasizes this point. The extensive nature of the prosecutorial misconduct prevents any conclusion, beyond a reasonable doubt, that it did not contribute to the death verdict in Petitioner's case.

This Court has consistently recognized that death is qualitatively different from a term of life imprisonment. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The combined effect of the prosecutorial misconduct at Petitioner's sentencing phase and an incorrect harmless error standard applied by the Ohio Supreme Court eradicated any reliability in Petitioner's death sentence.

The Ohio Supreme Court's failure to apply the standard in Satterwhite v. Texas warrants this Court's granting of certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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